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# The Adam Walsh Act and the Failed Promise of Administrative Federalism

Wayne A. Logan\*

## Introduction

With the realization that the Rehnquist Court's judicial federalism revolution was perhaps not so revolutionary after all,<sup>1</sup> scholars increasingly have looked to alternate institutions to preserve state autonomy and related federalism values. The most obvious candidate, Congress, has disappointed, persisting in its tendency to intrude on state interests by means of such vehicles as the Commerce Clause<sup>2</sup> and by evading political<sup>3</sup> and process<sup>4</sup> federalism safeguards. Attention has thus shifted to the federal executive branch, an increasingly dominant lawmaking force in modern-day America.<sup>5</sup>

Scholars have suggested a variety of ways to temper federal agency prerogatives vis-à-vis the states, ranging from resuscitating the nondelegation doctrine<sup>6</sup> to curtailing preemption authority, which one

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<sup>1</sup> See ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* 38–39 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 81–82 (2001).

<sup>2</sup> See Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 379–91 (surveying caselaw showing the modest effect of *Lopez* in promoting successful challenges to federal exercises of Commerce Clause authority).

<sup>3</sup> See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546–47 (1954) (maintaining that state election of federal representatives serves as a political check on interference with states' rights); see also Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 223–27 (2000) (updating Wechsler's seminal article and discussing the failure of political checks to ensure protection of state authority).

<sup>4</sup> See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1379–90 (2001) (noting congressional attempts to evade constitutional constraints and requirements in lawmaking).

<sup>5</sup> See *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting) (“For some time, the sheer amount of law . . . made by the [administrative] agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.”).

<sup>6</sup> See, e.g., Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 610 (2009); Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 57–58 (2008).

commentator has called “the central federalism issue of our time.”<sup>7</sup> Of late, such traditional negative limits have been complemented by positive assertions that agencies are actually best suited institutionally to serve federalism interests. Several respected scholars have recently argued that, rather than acting as instruments of federal hegemony, agencies possess superior capacity—compared to Congress and the courts—to reflect and serve state values and concerns. Gillian Metzger, for instance, has gone so far as to characterize “administrative law as the new federalism.”<sup>8</sup> The idea, however, that agencies can be effective stewards and agents of federalism has inspired resistance, including from sitting members of the Supreme Court.<sup>9</sup>

To date, the competing positions have played out only in the theoretical realm. In keeping with the dearth of empirical information on the internal workings of agencies more generally,<sup>10</sup> claims of agency superiority have been merely posited—not proven. This Essay examines the viability of the administrative federalism model, doing so through the lens of the federal Adam Walsh Act (“AWA”),<sup>11</sup> enacted in July 2006 to reconfigure the nation’s network of state sex offender registration and community notification laws.<sup>12</sup> As will be evident, the Department of Justice (“Justice”), charged by Congress with providing critically important substantive guidelines for the interpretation and implementation of the AWA, neither sought nor incorporated state views, to the states’ considerable consternation. Importantly, as a result, the final regulatory outcomes, which states are expected to adopt under congressional Spending Clause pressure, not only disre-

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7 Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 869 (2008); see also *Egelhoff v. Egelhoff*, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting) (asserting that preemption cases present “the true test of federalis[m]”).

8 Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2023 (2008); see also *id.* at 2109 (“[A]dministrative law has significant potential to advance state interests within the framework of the national administrative state.”); accord Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2153 (2009) (“With respect to promoting federalism values, ‘agencies . . . emerge as the institutional actor of choice, to the extent that they effectively represent state interests in our modern administrative state.’” (citation omitted)).

9 See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., joined by Souter, Thomas, and Ginsburg, JJ., dissenting) (“Unlike Congress, administrative agencies are clearly not designed to represent the interests of States . . .”).

10 See, e.g., Metzger, *supra* note 8, at 2085 (“[S]urprisingly little empirical evidence exists on federal-state interactions in rulemaking and other procedural contexts of particular relevance to administrative law.”).

11 Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §§ 16901–16991 (2006).

12 Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 102, 120 Stat. 587, 590 (2006) (codified at 42 U.S.C. § 16901).

garded state autonomy; they also lacked the significant practical wisdom and insights of states, secured by decades of experience with registration and community notification.

This Essay has four parts. Part I provides a brief overview of the literature on administrative federalism. Part II examines the rulemaking process undertaken by Justice to craft the critically important AWA guidelines. Part III examines how the federalism-enforcing benefits posited by advocates of administrative federalism size up against the reality of the actual rulemaking efforts of Justice. Using the AWA as a case study, this Essay casts significant doubt on the empirical assumptions of administrative federalism, adding to the limited empirical record amassed on state influence on agency rulemaking and providing an important object lesson for future agency-based criminal justice mandates that will likely come to pass.

### *I. Administrative Federalism*

Recent scholarship on the reputed federalism-enforcing benefits of agencies has rested on two main contentions. First, that federal agencies are naturally inclined to serve and reflect state interests in rulemaking by virtue of the organic functional connection between the federal government and states. According to Larry Kramer, for instance, “[t]he federal government needs the states as much as the reverse, and this mutual dependency guarantees state officials a voice in the [rulemaking] process.”<sup>13</sup> State influence is further ensured, Nina Mendelson has reasoned, because federal officials are wary of the political fallout likely associated with their disregard of state interests.<sup>14</sup>

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<sup>13</sup> Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544 (1994); see also Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 193 (2004) (asserting that “federal dependence on the knowledge and resources of cooperating state regulators” ensures a degree of federal agency sensitivity to state interests); Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1227 (2001) (describing “picket-fence federalism,” whereby “state and federal agency experts within the same specialty—the ‘posts’ in the ‘fence’—often share more in common with each other than they do with the level of government by which they are employed”). For earlier recognitions of this phenomenon, see DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 162 (2d ed. 1972) (noting that because federal authorities rely on states to achieve their policy goals, they heed their concerns and “are prepared to make concessions to their state counterparts”); MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 75–80 (1966) (discussing state/federal “sharing through proximity,” using examples of various federal regulatory agencies).

<sup>14</sup> Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 741, 775–78 (2004).

A second main contention is that the workings of the administrative process itself offer superior opportunities for states to influence federal policy, especially compared to Congress and the courts. In support of this institutional superiority, administrative federalism advocates point to a variety of mechanisms,<sup>15</sup> including the notice-and-comment requirements of the Administrative Procedure Act (“APA”)<sup>16</sup> and Executive Order 13,132, which oblige agencies to consider the federalism implications of their rulemaking activities.<sup>17</sup> Agencies thus enjoy, as Nina Mendelson has asserted, “a comparative advantage in considering federalism benefits that are national in nature, such as the value of encouraging state policy experimentation and the value of dividing power between different levels of government.”<sup>18</sup> In all, Brian Galle and Mark Seidenfeld have argued that the federal administrative apparatus is best suited to decide questions implicating state/federal allocations of power, and to reach comparatively enlightened regulatory results.<sup>19</sup>

## II. Adam Walsh Act Rulemaking

From a federalism perspective, sex offender registration and community notification laws would appear especially inapt candidates for federal regulatory attention. The laws seek the social control of convicted sex offenders, an issue squarely within the historic police power authority of state governments,<sup>20</sup> not the limited legislative aegis of Congress.<sup>21</sup> Indeed, for decades, state/federal relations conformed to

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<sup>15</sup> See, e.g., Metzger, *supra* note 8, at 2084–85.

<sup>16</sup> 5 U.S.C. § 553 (2006).

<sup>17</sup> Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999), *reprinted in* 5 U.S.C. § 601 (2006). The Order, *inter alia*, discourages “one-size-fits-all approaches to public policy problems” and urges deference “to the States when taking action that affects the policymaking discretion of the States . . . .” *Id.* at 43,256.

<sup>18</sup> Mendelson, *supra* note 14, at 777; see also Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 781–82 (1999) (regarding agency rulemaking as the most “accessible,” “meaningful,” and “effective” avenue for public input).

<sup>19</sup> Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 2020 (2008).

<sup>20</sup> See THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) (defining state police powers as extending “to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . .”); see also Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 747–48 (2007) (“American federalism cannot be fully understood without reference to the police power, for . . . ‘police power’ was the name Americans chose in order to designate the whole range of legislative power not delegated to the federal government and thus retained by the states.” (footnote omitted)).

<sup>21</sup> See, e.g., *Screws v. United States*, 325 U.S. 91, 109 (1945) (“Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice

this norm: from their origin in the 1930s through the 1980s, registration and community notification laws were the subject of exclusive state and local initiative and control.<sup>22</sup>

In 1994, however, registration and notification caught the attention of Congress.<sup>23</sup> Concerned that law enforcement lacked readily available information on previously convicted offenders to facilitate the apprehension of offenders in the event of a recidivist sexual or child-related offense, Congress required that states adopt registration laws and allowed for, but did not require, community notification.<sup>24</sup> Even though, at the time, some twenty-four states had registries, a federal “stick”<sup>25</sup> was needed “to prod all States to enact similar laws and to provide for a national registration system to handle offenders who move from one State to another.”<sup>26</sup> The Jacob Wetterling Act,<sup>27</sup> signed into law by President Clinton in September 1994, did so by threatening to withhold from states ten percent of allocated federal crime-fighting funds under the Byrne Formula Grant Program if they failed to adopt congressionally prescribed registration requirements by a specified date.<sup>28</sup>

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rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.” (citation omitted)).

22 See WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 20–84 (2009). Modern-era registration laws were first enacted by local governments around Los Angeles in the early 1930s and sought to monitor “gangsters” feared to be flooding the area from Midwestern and Eastern cities. *Id.* at 22. California enacted the first statewide registration law in 1947, targeting convicted sex offenders. *Id.* at 30. Subsequent years witnessed only modest interest among states and localities. *Id.* at 46. Things changed in 1990 when Washington State, reacting to the horrific sexual mutilation of a child by a released sex offender, enacted the nation’s first community notification provision, which permits registrants’ identifying information to be disseminated to the communities in which they live. *Id.* at 49–51. Since then, and especially after the 1994 rape and murder of seven-year-old Megan Kanka in New Jersey, the laws have enjoyed nationwide force. *Id.* at 54–55.

23 For a fuller account of federal involvement in the area, see Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51 (2008).

24 See *id.* at 60–84.

25 139 CONG. REC. 31,251 (1993) (statement of Rep. Sensenbrenner).

26 *Id.* (statement of Rep. Ramstad).

27 Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (2006).

28 See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2042 (1994) (codified as amended at 42 U.S.C. § 14071(e)). The ten percent figure marked a significant decrease from prior bills. As originally proposed by Senator David Durenberger (R-Minn.) in 1991, the legislation required that noncompliant states be totally barred from receiving Byrne Grant funds, and the proposed loss was later lowered to twenty-five percent in 1991. See Logan, *supra* note 23, at 66 n.87.

Community notification attracted congressional attention again in May 1996 with Megan's Law,<sup>29</sup> which required that states publicly release identifying information on registrants.<sup>30</sup> Concerned that states were "reluctant" to employ community notification,<sup>31</sup> and that a lack of notification in some twenty states might leave communities vulnerable and encourage individuals to migrate to achieve anonymity,<sup>32</sup> Congress unanimously passed the legislation.<sup>33</sup> Once again, Congress required that states comply with federal requirements if they wished to receive their full allocation of Byrne Grant funds.<sup>34</sup>

During the 1990s, the federal-funding stick proved remarkably successful, with every United States jurisdiction enacting registration and community notification laws by 1999.<sup>35</sup> Federal laws in succeeding years pressured states to adopt a variety of additional requirements and policies, including use of the Internet to facilitate community notification.<sup>36</sup>

Such changes, although significant, pale in comparison to those required by the AWA, passed by voice votes with nearly three dozen cosponsors and quickly signed into law by President Bush in July 2006.<sup>37</sup> Motivated by congressional concern over the perceived patchwork of weak state laws containing loopholes permitting individuals to evade registration and notification,<sup>38</sup> the AWA sought to establish a

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<sup>29</sup> Megan's Law, 42 U.S.C. § 14071(d) (2006).

<sup>30</sup> See Megan's Law, Pub. L. No. 101-145, §§ 1-2, 110 Stat. 1345, 1345 (1996) (codified as amended at 42 U.S.C. § 14071(d)(2) (1996)).

<sup>31</sup> 142 CONG. REC. 10,310-11 (1996) (statement of Rep. McCollum).

<sup>32</sup> See *Minor and Miscellaneous Bills (Part 2): Hearing on H.R. 1143, H.R. 1144, H.R. 1145, H.R. 2092, H.R. 2137, H.R. 2453, H.R. 2587, H.R. 2607, H.R. 2641, H.R. 2650, H.R. 2803, H.R. 2804, H.R. 2974, H.R. 2980, H.R. 2996, Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. 98-100 (1996) (statement of Rep. Zimmer).

<sup>33</sup> See Logan, *supra* note 23, at 69.

<sup>34</sup> See Megan's Law § 2, 110 Stat. at 1345.

<sup>35</sup> LOGAN, *supra* note 22, at 65.

<sup>36</sup> Logan, *supra* note 23, at 72-74.

<sup>37</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified at 42 U.S.C. §§ 16901-16991 (2006)).

<sup>38</sup> See, e.g., H.R. REP. NO. 109-218, pt. 1, at 23-24 (2005); 152 CONG. REC. S8018 (daily ed. July 20, 2006) (statement of Sen. Allen); 152 CONG. REC. S8022 (daily ed. July 20, 2006) (statement of Sen. DeWine); 151 CONG. REC. H7889 (daily ed. Sept. 14, 2005) (statement of Rep. Green). As Senator Orrin Hatch (R-Utah), a co-sponsor of the bill, explained, the AWA created "uniform standards for the registration of sex offenders," emphasizing that it was

critical to sew together the patch-work quilt of 50 different State attempts to identify and keep track of sex offenders. . . . Laws regarding registration for sex offenders have not been consistent from State to State[.] now all States will lock arms and present a unified front in the battle to protect children. Web sites that have been weak in the past, due to weak laws and haphazard updating and based on inaccu-

“comprehensive national system for the registration of sex offenders and offenders against children.”<sup>39</sup> The law contains an unprecedented array of new registration and notification requirements, including a significant expansion in the scope of eligibility (e.g., adjudicated juveniles) and more onerous registration standards (e.g., in-person information verification, perhaps on a quarterly basis).<sup>40</sup> As before, Congress required that states wishing to receive Byrne Grant funds conform to the AWA’s requirements by a specified date—in this instance July 2009<sup>41</sup>—subject to extension by Justice.<sup>42</sup>

Of particular importance here, the AWA, like predecessor federal registration and notification laws, delegates broad general rulemaking authority to Justice<sup>43</sup> and specific authority to determine if the AWA is to be retroactively applied to individuals convicted before the law’s

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rate information, will now be accurate, updated, and useful for finding sex offenders.

152 CONG. REC. S8012, S8013 (daily ed. July 20, 2006) (statement of Sen. Hatch). Ernie Allen, President and CEO of the National Center for Missing and Exploited Children, testifying before the House Judiciary Committee, emphasized that “[t]he amount of protection a child is given shouldn’t depend on the state in which that child lives. There is clearly a need for more uniformity among State programs of community notification of sex offenders.” *Protecting Our Nation’s Children from Sexual Predators and Violent Criminals: What Needs to Be Done? Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 19 (2005) (statement of Ernie Allen, President and CEO, The National Center for Missing and Exploited Children). A “seamless, coordinated, uniform system that works” was needed, and states should disclose information on all registrants, not merely those deemed most likely to recidivate. *Id.*

<sup>39</sup> 42 U.S.C. § 16901 (2006).

<sup>40</sup> For a full discussion of these and other changes required by the AWA, see Logan, *supra* note 23, at 76–80.

<sup>41</sup> See 42 U.S.C. §§ 16912(a), 16924(a).

<sup>42</sup> The AWA provides that jurisdictions have until one year after the Attorney General makes available computer software for the establishment and operation of “uniform sex offender registries and Internet sites,” if the software is available later than July 2009. *Id.* § 16923(a). The Attorney General is also authorized to permit up to two one-year extensions of the initial July 2009 deadline. *Id.* § 16924(b). As of this writing, the software is not available and Justice has extended the compliance deadline to July 2010. Att’y Gen. Order No. 3081-2009 (May 26, 2009), available at <http://www.ojp.usdoj.gov/smart/pdfs/sornaorder.pdf>.

<sup>43</sup> Technically, Congress directed the Office of the Attorney General and a new regulatory entity under its control, the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (“SMART”), to create and administer the guidelines. See 42 U.S.C. § 16912(b) (delegating authority to “issue guidelines and regulations to interpret and implement” the AWA’s provisions); *id.* § 16945(a) (creating and specifying the duties of SMART). Here, for ease of reference, reference is made to Justice.



enactment,<sup>44</sup> a controversial issue with major policy significance and practical ramifications for states.<sup>45</sup>

In February 2007, Justice acted upon its delegated authority on the retroactivity issue and promulgated an interim rule to take effect on February 28, 2007,<sup>46</sup> intended to serve the “immediately necessary purpose” of making indisputably clear that the AWA applies retroactively.<sup>47</sup> Retroactivity was warranted because nonretroactivity would result in a

system for registration of sex offenders [that] would be far from “comprehensive,” and would not be effective in protecting the public from sex offenders because most sex offenders who are being released into the community or are now at large would be outside of its scope for years to come.<sup>48</sup>

The rule required all “sex offenders,” as defined by the AWA, to register, regardless of when they were convicted.<sup>49</sup>

Furthermore, Justice specified that its interim rule was to be implemented immediately, without the APA’s usual requirements of a thirty-day delay and opportunity for public notice and comment.<sup>50</sup> It invoked the APA’s “good cause” exception, which is available when observance of the requirements would be “impracticable, unnecessary, or contrary to the public interest.”<sup>51</sup> Justice supported its deci-

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<sup>44</sup> See *id.* § 16913(d) (“[Justice] shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders . . .”). In addition, Congress delegated authority to Justice on several less significant issues. See *id.* § 16914(a)(7) (providing authority to expand the scope of information, specified by the AWA, that registrants must provide state authorities for inclusion in registries); *id.* § 16918(b)(4) (providing authority to augment the kinds of information falling under the AWA’s list of “mandatory exemptions” from community notification (e.g., the Social Security numbers of registrants)).

<sup>45</sup> See *infra* notes 61–73 and accompanying text (discussing concerns raised by states over federal imposition of retroactivity requirement).

<sup>46</sup> Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8,894, 8,895 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72).

<sup>47</sup> *Id.* at 8,896 (“The current rulemaking serves the . . . immediately necessary purpose of foreclosing any dispute as to whether [the AWA] is applicable where the conviction for the predicate sex offense occurred prior to the enactment of [the AWA]. This issue is of fundamental importance to the initial operation of [the AWA], and to its practical scope for many years, since it determines the applicability of [the AWA’s] requirements to virtually the entire existing sex offender population.”).

<sup>48</sup> *Id.*

<sup>49</sup> See *id.* at 8,897.

<sup>50</sup> *Id.* at 8,896.

<sup>51</sup> *Id.* (quoting 5 U.S.C. § 553(b)(B), (d)(3) (2006)).

sion by citing the dangers thought to be associated with delaying registration of individuals with preenactment convictions, stating:

Delay in the implementation of this rule would impede the effective registration of such sex offenders and would impair immediate efforts to protect the public from sex offenders who fail to register through prosecution and the imposition of criminal sanctions. The resulting practical dangers include the commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders that could have been prevented had local authorities and the community been aware of their presence, in addition to greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by [the AWA].<sup>52</sup>

In addition, despite the obvious federalism implications of the AWA, which would revamp, sometimes radically, detailed and often quite distinct registration and notification laws in all fifty states,<sup>53</sup> Justice asserted that a federalism impact assessment under Executive Order 13,132 was not necessary, as its retroactivity rule would “not have substantial direct effects on States, on the relationship between the national government and the States, or on the distribution of power

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<sup>52</sup> Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8,894, 8,896–97 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72). The explanation, however, was not entirely convincing, given that the provision was to take effect almost seven months to the day after the AWA’s enactment and almost thirteen years after the Jacob Wetterling Act, not to mention the near two-year pendency of the AWA itself and the reality that persons retroactively targeted possibly had not committed a sexual offense for many years. Indeed, given the destabilizing effects of registration and notification (the latter in particular) on individuals, it could be asserted that retroactivity actually increased public safety concerns. For discussion of the research on such effects, see Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 187–89 (2000).

Of late, federal circuits have disagreed over whether Justice’s AWA rulemaking satisfied the “good cause” exceptions relative to a provision in the AWA making it a federal felony to cross state lines without registering. Compare *United States v. Cain*, 583 F.3d 408, 420–24 (6th Cir. 2009) (finding the standard not satisfied, by a 2–1 vote), with *United States v. Gould*, 568 F.3d 459, 469–70 (4th Cir. 2009) (finding the standard satisfied, by a 2–1 vote), and *United States v. Dixon*, 551 F.3d 578, 583 (7th Cir. 2008) (unanimously condemning the claim as “frivolous”), cert. granted sub nom. *Carr v. United States*, 130 S. Ct. 47 (2009). One aspect of this dispute concerns whether courts should examine the agency resort to “good cause” under a de novo or “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” standard of review. See *Cain*, 583 F.3d at 434 n.4 (Griffin, J., dissenting) (quoting 5 U.S.C. § 706(2)(A) (2006)). As the Sixth Circuit concluded in *Cain*, finding a lack of good cause has particular persuasive appeal given the heavy burden traditionally thought required to invoke the exception and the importance of advance notice vis-à-vis criminal prohibitions. *Id.* at 423.

<sup>53</sup> See Logan, *supra* note 23, at 76–82.

and responsibilities among the various levels of government.”<sup>54</sup> Justice also specified, again without apparent justification, that “[t]here has been substantial consultation with state officials regarding the interpretation and implementation” of the rule.<sup>55</sup>

Although the interim retroactivity rule took immediate effect, Justice stated that it would receive comments through April 30, 2007.<sup>56</sup> With limited awareness of the rulemaking among state authorities and related organizations, only a handful of comments were filed before the deadline.<sup>57</sup> Almost all objected to the retroactive application of the AWA, expressing concerns over its fairness and adverse impact on state resources, with many parties expressing particular concern over the impact of retroactivity on adjudicated juvenile offenders.<sup>58</sup> Among the comments filed was a letter from the National Conference of State Legislatures stating its opposition to retroactivity “so as to respect state sovereignty over the treatment of sex offenders as laid out in each state’s respective sex offender registry provisions.”<sup>59</sup>

On May 17, 2007, without publishing a response to comments received,<sup>60</sup> Justice released its proposed guidelines for the AWA as a whole, including elaboration on the contours of retroactivity, and specified August 1, 2007, as the deadline for public comment.<sup>61</sup> Justice stated that registration would extend to all statutorily defined “sex offenders . . . if they remain in the system as prisoners, supervisees, or registrants or if they later reenter the system because of conviction for

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<sup>54</sup> Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. at 8,897.

<sup>55</sup> *Id.*

<sup>56</sup> *See id.* at 8,895.

<sup>57</sup> *See* Telephone Interview with Kay Cohen, Deputy Executive Dir., Nat’l Criminal Justice Ass’n (Apr. 17, 2009) (transcript on file with author); Telephone Interview with Susan Parnas Frederick, Fed. Affairs Counsel, Nat’l Conference of State Legislatures (Apr. 17, 2009) (transcript on file with author); *see also* Letter from Joe A. Garcia, President, Nat’l Cong. of Am. Indians, to David J. Karp, Office of Legal Policy (Apr. 30, 2007), *available at* [http://www.ncai.org/ncai/resource/documents/governance/Adam\\_Walsh\\_Act/interim\\_rule\\_comments\\_final.pdf](http://www.ncai.org/ncai/resource/documents/governance/Adam_Walsh_Act/interim_rule_comments_final.pdf), at 3 (“Indian tribes were not consulted during the development of the Adam Walsh Act or the interim rule, and have not been asked to give input into other guidelines that are currently being developed by [Justice].”).

<sup>58</sup> *See* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,030–32 (July 2, 2008).

<sup>59</sup> Letter from Susan Parnas Frederick, Fed. Affairs Counsel, Nat’l Conference of State Legislatures, to David Karp, Senior Counsel, Office of Legal Policy, U.S. Dep’t of Justice (Apr. 23, 2007) (on file with author).

<sup>60</sup> *See* *United States v. Gould*, 568 F.3d 459, 477 (4th Cir. 2009) (Michael, J., dissenting).

<sup>61</sup> *See* The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30,209, 30,210–13 (proposed May 30, 2007).

some other crime (whether or not the new crime is a sex offense).”<sup>62</sup> Thus, if individuals are convicted in the distant past of an offense warranting registration under the AWA and later commit a nonsexual offense such as embezzlement, they are subject to registration, potentially for their lifetimes.

The proposed guidelines were the subject of a forum in Indianapolis, Indiana, from July 24–27, 2007, just before the comment deadline, which the author attended. State representatives and criminal justice professionals vigorously criticized the guidelines and the administrative process leading to their creation. These sentiments, especially relating to the question of retroactivity, were echoed in written comments lodged with Justice. A letter from the chair of Idaho’s Criminal Justice Commission, for instance, condemned the “breadth of the duties of the state” resulting from the retroactivity requirement, calling it “an onerous and unworkable burden on the state and its limited resources.”<sup>63</sup>

Similarly, a letter jointly signed by the heads of six New York state agencies concerned with implementation of the law urged that jurisdictions be afforded discretion on the retroactivity question:

When each state first created its sex offender registry, it made a choice about how the registration requirements would be applied to previously convicted offenders.

The decision on retroactive applicability raises substantial practical and policy concerns that are more appropriately addressed by the individual states. [Part of the guidelines] will greatly expand the pool of registerable sex offenders in New York State. It will also require the State to search the prior criminal history of each person entering the criminal justice system to determine whether, at any time in the past, he or she was convicted of, or adjudicated for, a qualifying sex offense. This is both burdensome and unworkable because in many cases older records will no longer be available, or they will be incomplete or inaccurate.<sup>64</sup>

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<sup>62</sup> *Id.* at 30,228.

<sup>63</sup> Letter from Brent D. Reinke, Chairman, Idaho Criminal Justice Comm’n, to Laura L. Rogers, Dir., SMART Office, Office of Justice Programs, U.S. Dep’t of Justice (July 31, 2007), available at [http://www.ojp.usdoj.gov/smart/pdfs/guideline\\_comments.pdf](http://www.ojp.usdoj.gov/smart/pdfs/guideline_comments.pdf), at 622–23.

<sup>64</sup> Letter from Denise O’Donnell, Comm’r, N.Y. State Div. of Criminal Justice Servs. et al., to Laura L. Rogers, Dir., SMART Office, Office of Justice Programs, U.S. Dep’t of Justice (July 31, 2007), available at [http://www.ojp.usdoj.gov/smart/pdfs/guideline\\_comments.pdf](http://www.ojp.usdoj.gov/smart/pdfs/guideline_comments.pdf), at 740–44.

The New York letter added that retroactivity expanded the pool of registerable offenders, which would “exacerbate the difficulties that states are now facing in finding appropriate housing for sex offenders.”<sup>65</sup>

States also expressed more global concerns over the proposed guidelines. Virginia, for instance, stated that the “proposed regulations would be extremely cumbersome to implement and cause Virginia to devote significant resources to the collection of information which would be of limited use. Those states with strong registration programs should have the option of implementing the proposed regulations.”<sup>66</sup> The National Conference of State Legislatures (“NCSL”) commented that the proposed guidelines “compound the burdensome, preemptive scheme of the underlying law [the AWA] they seek to clarify.”<sup>67</sup> In a posting to its website, the NCSL condemned the AWA’s “one-size-fits all approach” and harshly criticized Justice’s failure to consider state interests in its proceedings, stating:

These provisions preempt many state laws and create an unfunded mandate for states because there are no appropriations in the Act or in any appropriations bill. Many of the provisions of the Adam Walsh Act were crafted without state input or consideration of current state practices. The mandates imposed by the Adam Walsh Act are inflexible and, in some instances, not able to be implemented.<sup>68</sup>

In June 2008, thirteen months after being proposed, and well after the projected three-month period of revision, Justice issued its Fi-

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<sup>65</sup> *Id.* Other states voiced similar concerns over the increased burden associated with retroactivity. See E-mail from Diane Sherman, Mich. Criminal Justice Info. Ctr., Mich. Dep’t of State Police, to SMART Office, Office of Justice Programs, U.S. Dep’t of Justice (Aug. 2, 2007, 5:52 PM), available at [http://www.ojp.usdoj.gov/smart/pdfs/guideline\\_comments.pdf](http://www.ojp.usdoj.gov/smart/pdfs/guideline_comments.pdf), at 619–20 (“Retroactivity puts a work load burden on states. Much research will be needed on old laws to determine whether they apply to . . . registration.”); E-mail from Janet Neely, Cal. Deputy Attorney Gen., to SMART Office, Office of Justice Programs, U.S. Dep’t of Justice (July 26, 2007, 7:46 PM), available at [http://www.ojp.usdoj.gov/smart/pdfs/guideline\\_comments.pdf](http://www.ojp.usdoj.gov/smart/pdfs/guideline_comments.pdf), at 727–39 (asserting that creation of a database containing superseded statutes of California and other states “is not a feasible project”).

<sup>66</sup> Letter from W. S. Flaherty, Superintendent, Va. State Police, to Laura L. Rogers, Dir., SMART Office, Office of Justice Programs, U.S. Dep’t of Justice (July 31, 2007), available at [http://www.ojp.usdoj.gov/smart/pdfs/guideline\\_comments.pdf](http://www.ojp.usdoj.gov/smart/pdfs/guideline_comments.pdf), at 601–05.

<sup>67</sup> Letter from Carl Tubbesing, Deputy Executive Dir., Nat’l Conference of State Legislatures, to Laura L. Rogers, Dir., SMART Office, Office of Justice Programs, U.S. Dep’t of Justice (July 30, 2007), available at [http://www.ojp.usdoj.gov/smart/pdfs/guideline\\_comments.pdf](http://www.ojp.usdoj.gov/smart/pdfs/guideline_comments.pdf), at 590–95.

<sup>68</sup> NAT’L CONFERENCE OF STATE LEGISLATURES, 2008–2009 POLICIES: LAW AND CRIMINAL JUSTICE COMMITTEE, <http://www.ncsl.org/statefed/lawandj.htm> (last visited May 10, 2010).

nal AWA Guidelines.<sup>69</sup> Running sixty pages in length, the guidelines reflected little substantive change from those initially proposed,<sup>70</sup> with Justice rebuffing state concerns either because they purportedly contradicted the terms of the AWA itself or failed to qualify as persuasive bases to alter proposed guideline requirements.<sup>71</sup> The guidelines maintained their original position on retroactivity, dismissing state concerns as merely sounding in “unfair[ness]” or being “disagreeable from the standpoint of sex offenders.”<sup>72</sup> In response to state requests for a more generous interpretation of the AWA’s requirement of “substantial compliance,” Justice offered that doing so would “effectively treat [the AWA] as a set of suggestions for furthering public safety in relation to released sex offenders, which could be dispensed with based on arguments that other approaches would further that general objective, though not encompassing the specific minimum measures that [the AWA] prescribes . . . .”<sup>73</sup>

### III. Testing the Tenets of Administrative Federalism

As the foregoing suggests, the posited federalism benefits of agency rulemaking did not come to fruition with the AWA. Contrary to expectations that the U.S. would collaborate with states<sup>74</sup> and be sensitive to their interests,<sup>75</sup> Justice turned a deaf ear, from the early suspension of notice-and-comment requirements and the guideline

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<sup>69</sup> The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030 (July 2, 2008).

<sup>70</sup> See *id.* Federal policy on the parameters of the registration of juveniles is a narrow exception. Apparently in response to state objections based on a technical reading of the AWA that would require registration of juveniles for less serious offenses (such as a fourteen-year-old having sex with an eleven-year-old), the Final Guidelines deviate from the AWA. In apparent violation of its required mandate to interpret, not prescribe, registration standards, Justice devised a meaning that was less onerous than the one tied to the “aggravated sexual abuse” standard prescribed by the AWA itself. See *id.* at 38,040–41.

<sup>71</sup> See generally *id.*

<sup>72</sup> *Id.* at 38,035–36.

<sup>73</sup> *Id.* at 38,036; see also *id.* at 38,037 (rejecting the view that the AWA represents “mere advice” to states).

<sup>74</sup> See, e.g., Galle & Seidenfeld, *supra* note 19, at 1957 (“Representatives of interest groups . . . do have access to the staff members in each of the offices represented on a rulemaking team.” (citation omitted)); Mendelson, *supra* note 14, at 774 (“Although agencies may not have incorporated the more abstract benefits of ‘federalism’ . . . [they] do appear to have systematically consulted with states. Thus, they may be honoring state interests as states have expressed them.”).

<sup>75</sup> See, e.g., Galle & Seidenfeld, *supra* note 19, at 1973 (“The states have proven to be effective at influencing agencies to preserve their state prerogatives.”); Metzger, *supra* note 8, at 2085 n.228 (“Anecdotal evidence also exists of notice-and-comment requirements having a state-protective impact.”).

pre-proposal phase (a critically important time<sup>76</sup>) through promulgation of the final guidelines.<sup>77</sup> Furthermore, contrary to claims of superior agency awareness of and dedication to the value of state experimentation,<sup>78</sup> Justice resolutely resisted extensive state input and dismissed state pleas for flexibility.<sup>79</sup>

The evidence proffered here thus supplements and supports the limited empirical record amassed on the meager influence of notice-and-comment procedures.<sup>80</sup> It also aligns with prior work showing the effective irrelevance of Executive Order 13,132,<sup>81</sup> with Justice giving short shrift to the impact that its rulemaking would have on registration and community notification systems, which have enormous policy and resource implications for state governments.<sup>82</sup>

The disappointing saga assumes heightened significance given the broader institutional failure marking the AWA's history. Here, it bears mention, the advocates of administrative federalism are right on the mark when they question the efficacy of other branches. Congress did a notably poor job of involving states during the two-year genesis of the AWA, utilizing a fast-track legislative process characterized by truncated debate and limited factfinding dominated by self-confirmatory partisan committee testimonials.<sup>83</sup>

Federal legislators unanimously required that states adopt an unprecedented array of significant changes to their registration and notification systems, which not only remain empirically unverified,<sup>84</sup> but which, taken together, perhaps most closely resemble the regime of

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<sup>76</sup> See N.J. Dep't of Env'tl. Prot. v. EPA, 626 F.2d 1038, 1049–50 (D.C. Cir. 1980) (noting the importance of “affected parties hav[ing] an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas”); see also CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 79–80 (3d ed. 2003).

<sup>77</sup> See *supra* notes 69–73 and accompanying text.

<sup>78</sup> See Galle & Seidenfeld, *supra* note 19, at 1976 (“[A]gencies are well suited for evaluating the benefits of both localism and the need for experimenting within the programs they regulate.”).

<sup>79</sup> See *supra* notes 70–73 and accompanying text.

<sup>80</sup> See, e.g., Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 424–25 (2005); Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 621 (2002).

<sup>81</sup> See, e.g., Nina Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 719–22 (2008); Metzger, *supra* note 8, at 2085–86.

<sup>82</sup> See *supra* notes 63–68 and accompanying text; see also LOGAN, *supra* note 22, at 109–13 (surveying the impact of registration and notification on state resources).

<sup>83</sup> See LOGAN, *supra* note 23, at 112–14 (discussing the AWA legislative process).

<sup>84</sup> See LOGAN, *supra* note 22, at 109–33 (surveying limited research done on the effects and consequences of registration and notification).

one of the nation's smallest states, Delaware, the home of an AWA chief sponsor, then-Senator Joseph Biden.<sup>85</sup> The sole indication of congressional awareness of the federalism ramifications within the AWA itself<sup>86</sup> came with its concession that a state need not adopt any of its provisions if doing so “would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction’s highest court.”<sup>87</sup> If such a constitutional conflict exists, “the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of [the law] and to reconcile any conflicts between [the AWA] and the jurisdiction’s constitution.”<sup>88</sup> Under the AWA, “the Attorney General shall consult with [state officials] concerning the jurisdiction’s interpretation of the jurisdiction’s constitution and rulings thereon by the jurisdiction’s highest court.”<sup>89</sup>

Sensitivity to state autonomy, however, only goes so far. For instance, the AWA accords no respect to state legislative or executive branch determinations relative to registration and notification. Only a constitutionally commanded position, backed by a holding from the state’s highest court (and seemingly not even a lowly intermediate appellate court), will suffice. Moreover, Congress promised that the federal government would “work with the jurisdiction to see whether *the problem* can be overcome . . .”<sup>90</sup>—a notably unceremonious way to refer to a state-based constitutional right. If a jurisdiction fails to “substantially implement” the AWA in the absence of a legitimate, “demonstrated inability” due to its own constitutional dictate, as certi-

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<sup>85</sup> See Logan, *supra* note 23, at 114. Speaking to this symmetry, a member of the Connecticut General Assembly offered in 1998 that federal directives had “more to do with the needs of the home States of the various congressional committee chairs than they do with our States. I think this has been a source of great frustration for many State legislators around the country. . . . ‘One-size-fits-all’ [f]ederal requirements really do not apply . . . .” Mike Lawlor, Representative, Conn. Gen. Assembly, Creating Effective Sex Offender Legislation Requires Collaboration Between Lawmakers and Justice Agencies, Paper Presented at the Bureau of Justice Statistics/SEARCH Conference: National Conference on Sex Offender Registries (Apr. 1998), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/Ncsor.pdf>, at 86.

<sup>86</sup> The only evidence of congressional willingness to actually consider state experience and expertise came after the fact, with a directive that the Attorney General assemble a task force to assess competing registrant classification approaches, consisting of persons who “represent national, State, and local interests” and possess expertise in relevant academic and experiential areas. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 637, 120 Stat. 587, 646 (codified at 42 U.S.C. §§ 16901–16991 (2006)).

<sup>87</sup> 42 U.S.C. § 16925(b)(1) (2006).

<sup>88</sup> *Id.* § 16925(b)(2).

<sup>89</sup> *Id.*

<sup>90</sup> The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,041 (July 2, 2008) (emphasis added).



fied by Justice, or otherwise cannot satisfy Justice with an accommodation, the jurisdiction will lose its federal funding.<sup>91</sup> Adding insult to injury, the share lost by a jurisdiction will be reallocated to its compliant peers.<sup>92</sup>

True to form, the courts as well have failed to temper congressional zeal. Nondelegation challenges have almost universally been rejected,<sup>93</sup> and the judicial record of finding fault with the failure of Justice to comply with APA requirements, in particular those relating to notice and comment, has been mixed.<sup>94</sup>

All of this is certainly not to take a side in the ongoing debate over the preferred institutional capacity of any particular branch relative to federalism interests. Rather, the discussion is meant to underscore the fact that rulemaking should not be embraced as a basis to redeem an otherwise flawed process. The tripartite system failure, in which Justice's efforts figured centrally,<sup>95</sup> has predictably resulted in

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<sup>91</sup> 42 U.S.C. § 16925(a).

<sup>92</sup> See *id.* § 16925(c).

<sup>93</sup> See, e.g., *United States v. Madera*, 528 F.3d 852, 857 (11th Cir. 2008); *United States v. Samuels*, 543 F. Supp. 2d 669, 677–78 (E.D. Ky. 2008). For an argument against the current desuetude of the nondelegation doctrine relative to criminal justice authority in particular, see Logan, *supra* note 23, at 115 n.367.

<sup>94</sup> See *supra* note 52 (citing varied circuit outcomes relative to whether the APA's "good cause" standard to excuse notice and comment was satisfied). Individuals can, of course, mount constitutional challenges—for instance, that retroactive application of the AWA violates ex post facto principles. Alaska's pre-AWA regime was deemed nonpunitive in character and was upheld against ex post facto challenge in *Smith v. Doe*, 538 U.S. 84 (2003). Conceivably, the AWA's more stringent requirements could at some point result in a successful challenge, but would fail to redress the concern addressed here. Cf. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 993 (2006) (noting that individual constitutional claims "act as poor safeguards against structural abuses and inequities").

<sup>95</sup> Perhaps the most public expression of state displeasure occurred in March 2009, when Emma Devillier, a Louisiana Assistant Attorney General and Chief of the Sexual Predator Unit, vigorously condemned the rulemaking process before a House Judiciary Committee Hearing on Barriers to Implementation of the Sex Offender Registration and Notification Act. Devillier criticized Justice for, inter alia, its rigid, unrealistic interpretation of the AWA's "substantial compliance" requirement; the major systemic consequences of the retroactivity rule; and the guidelines' failure to take into account varied state criminal laws in their definitions. Devillier testified that

[the AWA's] offense-based (at least as interpreted by [Justice]), retroactive system is over inclusive, overly burdensome on the state, exorbitantly costly, and will actually do more to erode community safety than to strengthen it. This is generally true, I am advised, not just for Louisiana but for most states.

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To ensure that federal legislation . . . is based on sound public policy and that it will be effectively implemented, all stakeholders must be brought to the table.

*Sex Offender Notification and Registration Act (SORNA): Barriers to Timely Compliance by States: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H.*

widespread dissatisfaction with the AWA, risking for the first time since 1994 that the states will not comply with federal mandates.<sup>96</sup> In the face of sustained state criticism of the AWA and its guidelines,<sup>97</sup> as well as Justice's widely understated assessment of the resource impact on states,<sup>98</sup> Justice has agreed to blanket extensions to the initial July 2009 deadline.<sup>99</sup> To date, only four jurisdictions (Delaware, Ohio, and

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*Comm. on the Judiciary*, 111th Cong. 1 (2009) (statement of Emma J. Devillier, Assistant Att'y Gen., La.); *see also, e.g.*, Diane Jennings, *States Wrestle with How to Fund Federal Sex Offender Law*, DALLAS MORNING NEWS, Dec. 23, 2008, at 1A (discussing dissatisfaction among Texas legislators over retroactivity policy).

<sup>96</sup> *See* Logan, *supra* note 23, at 83–84 (surveying media reports indicating that many states will not adopt AWA requirements due to costs and ideological opposition); *see also* Abigail Goldman, *Sex Offender Act Might Not Be Worth Its Cost to Nevada*, LAS VEGAS SUN, Feb. 15, 2009, at 1 (discussing sentiment in Nevada). Recently, the California Sex Offender Management Board, which oversees the nation's largest registration and notification system, issued the following statement:

The California State Legislature, Governor and citizens should elect not to come into compliance with the Adam Walsh Act. Current effective California state law and practice . . . is more consistent with evidence-based practice that can demonstrate real public policy outcomes.

Instead of incurring the substantial—and un-reimbursed—costs associated with the Adam Walsh Act, California should absorb the comparatively small loss of federal funds that would result from not accepting the very costly and ill-advised changes to state law and policy required by the Act . . . .

CAL. SEX OFFENDER MGMT. BD., ADAM WALSH ACT: STATEMENT OF POSITION (2009), *available at* [http://www.opd.ohio.gov/AWA\\_Information/AWA\\_CA\\_SOMB\\_SORNA\\_Position\\_Paper.pdf](http://www.opd.ohio.gov/AWA_Information/AWA_CA_SOMB_SORNA_Position_Paper.pdf).

<sup>97</sup> *See supra* notes 63–68 and accompanying text; *see also, e.g.*, Abby Goodnough & Monica Davey, *Effort to Track Sex Offenders Draws Resistance from States*, N.Y. TIMES, Feb. 9, 2009, at A1 (noting a broad array of state criticisms, including that “[m]any states complain that the new federal law disrupts and even clashes with their own carefully created policies for managing sex offenders”); Jennings, *supra* note 95, at 1A (discussing dissatisfaction among Texas legislators over the juvenile registration requirement and the use of conviction-based registration, given the state's perceived failed experimentation with the policies in recent years); Editorial, *Tier Drop: State Should Revisit Sex Offender Rosters*, THE OKLAHOMAN, Apr. 13, 2009, at 10A (noting that since Oklahoma amended its laws in 2007, in a failed early attempt to satisfy the AWA, the number of registrants subject to lifetime registration nearly doubled from the number registered under prior law); Memorandum of the Nat'l Criminal Justice Ass'n and the Nat'l Conference of State Legislatures (June 12, 2009) (on file with author) (urging Justice “to engage in meaningful consultation with state and local stakeholders in order to formulate reasonable rules and regulatory authority changes that address state concerns and provide a workable format for states to move forward with implementation of [the AWA]”).

<sup>98</sup> *See, e.g.*, Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8,894, 8,897 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72) (concluding that retroactivity will not impose substantial costs on states). In California alone, authorities estimated that a partial assessment of required changes would require an expenditure of \$38 million, based on additional record checks, more frequent reporting, and reclassification of registrants. *See* Goodnough & Davey, *supra* note 97, at A13.

<sup>99</sup> Att'y Gen. Order No. 3081-2009 (May 26, 2009), *available at* <http://www.ojp.usdoj.gov/smart/pdfs/sornaorder.pdf>. A letter signed by Senate and House Judiciary Chairs and Ranking

two small Indian reservations) have achieved “substantial compliance” as determined by Justice.<sup>100</sup> Meanwhile, although Senator Patrick Leahy (D-Vt.), Chair of the Senate Judiciary Committee, has signaled that the AWA might be in for a legislative overhaul,<sup>101</sup> thus far congressional resolve to reopen the law seems to be lacking.<sup>102</sup>

### Conclusion

This paper has two chief goals: first, to augment the modest literature on the role of states in the federal agency rulemaking process; and second, to test the empirical assumptions that have animated discourse on administrative federalism. With respect to the latter, Justice rulemaking efforts relative to the AWA call into serious question the soundness of recent assertions of the institutional superiority of agencies as guardians of state interests. Indeed, if, as advocates maintain, the comparative institutional choice question turns on the empirical question of which branch is best situated to serve federalism interests and develop optimal public policy,<sup>103</sup> the case study offered here fails to inspire confidence. Justice gave short shrift to state autonomy and ignored—and actually acted contrary to—the insights of state authorities, who have amassed considerable expertise in operating registration and notification systems since at least the early 1990s.

Before closing, it is worthwhile to note some caveats that might be in order. For one, the subject area in question—criminal justice—could be thought to be unique, such as to undermine the transferability of this case study.<sup>104</sup> Compared to other areas of regulatory con-

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Members offered in support of an extension stated that “there have been unforeseen difficulties in implementing the law and significant added costs . . . .” Letter from Patrick Leahy, Chairman, Senate Comm. on the Judiciary, and John Conyers, Chairman, House Comm. on the Judiciary, to Eric Holder, Attorney Gen. of the U.S. (Mar. 19, 2009).

<sup>100</sup> See Press Release, Office of Justice Programs, U.S. Dep’t of Justice, Justice Department Announces Fourth Jurisdiction to Implement Sex Offender Registration and Notification Act (May 6, 2010), available at <http://www.ojp.usdoj.gov/newsroom/pressreleases/2010/SMART10065.htm>.

<sup>101</sup> See Goodnough & Davey, *supra* note 97, at A13.

<sup>102</sup> See Telephone Interview with Susan Parnas Frederick, Fed. Affairs Counsel, Nat’l Conference of State Legislatures (Sept. 28, 2009) (transcript on file with author).

<sup>103</sup> See, e.g., Galle & Seidenfeld, *supra* note 19, at 1969 (“Decisions about federalism are often a choice of institutions . . . .”); *id.* at 1949 (“[T]he issue is not which institution best enables state influence over regulation, but rather which institution fosters state influence that will enhance public welfare . . . .”); see also Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. REV. 727, 779 (2008) (“Institutional choice analysis . . . rests ultimately on empirical judgments about the capabilities of different legal institutions.”).

<sup>104</sup> See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1308 (2009) (noting that individual case studies “are likely to be especially important,

cern, such as pollution, pharmaceutical drugs, and the like, criminal justice is a relatively uncommon target of federal agency attention.<sup>105</sup> Indeed, the reasons typically thought to motivate congressional agency delegations, such as political blame-shifting and interest group pressure,<sup>106</sup> are largely absent with criminal justice.<sup>107</sup> So too, typically, is the need for technical expertise,<sup>108</sup> a commonly voiced justification for agency delegation.<sup>109</sup> The upshot of this is that Justice, compared to agencies having more consistent exposure to the public demands of rulemaking, was perhaps simply experientially ill equipped to handle the task at hand.<sup>110</sup>

This experiential deficit, in turn, did not stand to be ameliorated by any institutional imperative that might have obliged greater federal

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as every administrative scheme is different and the conditions of bargaining between the states and the federal government vary widely from context to context"); Sharkey, *supra* note 8, at 2155 ("Agencies, at least in theory, are equipped to make nuanced, flexible determinations regarding federal-state regulatory balance, based upon underlying policy considerations that may vary by regulatory context."). As Jody Freeman has pointed out, agency and regulatory context can have direct bearing on the utility of the notice-and-comment process in particular. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 11 n.27 (1997).

<sup>105</sup> Several provisions of the APA itself attest to this exceptionalism. See, e.g., Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 609 (2009) (noting public rulemaking exceptions made for criminal law enforcement agencies). Nevertheless, other instances of federal criminal justice rulemaking can be readily found, including those evincing disregard of state interests, such as the 2003 decision by the Immigration and Naturalization Service ("INS") to preempt state law requiring disclosure of the identities of inmates held in state institutions. See Ronald K. Chen, *State Incarceration of Federal Prisoners After September 11*, 69 BROOK. L. REV. 1335, 1345 (2004) (discussing the INS rule and calling the agency's conclusion that the rule lacked federalism implications "facially remarkable").

<sup>106</sup> See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS* 230–38 (1999).

<sup>107</sup> Cf. Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1979–88 (2006) (noting how the commonly identified factors motivating congressional agency delegations typically are not operative with respect to sentencing policy and practice).

<sup>108</sup> Retroactive application of the AWA, for instance, represented nothing so much as a political matter for resolution. On the political quality of agency decisions more generally, see, for example, Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1399 (1975) (observing that agencies make "'political' decisions in the highest sense of that term"); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 35–37 (2009).

<sup>109</sup> See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 479–80 (2003).

<sup>110</sup> This relative uniqueness, it is important to emphasize, should not be permitted to obscure the significance of the systemic breakdown evidenced here. For an insightful account of the death of checks on the criminal law- and policymaking process, see generally Barkow, *supra* note 94.

cooperation with and deference to states,<sup>111</sup> such as commonly occurs with environmental regulations<sup>112</sup> or those promulgated by the Department of Homeland Security (“DHS”) relative to the REAL ID Act of 2005.<sup>113</sup> Other than the need for Justice to sign off on “substantial compliance,” the AWA and its accompanying regulations necessitate little regular state/federal coordination, freeing the federal government to go it alone.

Moreover, it could be that sex offender policy in particular, with its unique political salience and potency, is *sui generis*.<sup>114</sup> Contemporary politicians, as is well known, do their utmost to out-tough one another with respect to sex offenders.<sup>115</sup> As a result, any members of Congress who might have successfully pushed for mitigation of the AWA’s onerous regime were absent from the scene. Also, unlike other regulatory areas, no organized industry aligns with localism and state autonomy, which might incentivize members of Congress to pressure the agency toward flexibility and experimentation. On its own, Justice—operating beyond the political klieg lights—failed to temper congressional zeal, promulgating an inflexible slate of regulations in disregard of expressed state interests and desires.

Finally, and critically important, concern over federalism itself is well known to vary in accord with the public policy at issue; federalism is often at best a second-order priority, with substantive policy concerns taking precedence. This prioritization is certainly in evidence with criminal justice policy, notwithstanding the historically predominant police power authority of states.<sup>116</sup>

Going forward, the story recounted here should serve as a cautionary tale of federal regulatory authority. Although agencies have the potential to play a helpful role in sustaining federalism, in abstract

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<sup>111</sup> See *supra* note 13 and accompanying text (discussing the posited tendency toward state/federal cooperation as a result of shared regulatory goals).

<sup>112</sup> See Sharkey, *supra* note 8, at 2159.

<sup>113</sup> See *id.* at 2150–52.

<sup>114</sup> As I have noted elsewhere, this uniqueness is arguably manifest in the sustained congressional focus, since 1994, on registration and notification, in contrast to federal criminal justice initiatives during the time that pressured states to conform to federal sentencing desires, which foundered. See Logan, *supra* note 23, at 122 n.406.

<sup>115</sup> See LOGAN, *supra* note 22, at 85–108 (discussing the political catalysts behind the recent wave of harsh measures targeting sex offenders).

<sup>116</sup> See Logan, *supra* note 23, at 107. For instance, since registration and notification caught the attention of Congress in the early 1990s, only a handful of federal legislators—all Democrats—have raised concerns over federal intrusions on state autonomy, a position that not coincidentally aligns with their typically more tempered approach to criminal justice matters. *Id.* at 104.

or instrumental terms, or both, their success in doing so very much depends on systemic change. As Gillian Metzger has observed, “[u]ltimately, the success of efforts to integrate federalism and the modern federal administrative state hinges on agencies—and their political masters in the executive branch and Congress—being willing to trade off some degree of uniformity for the benefits of diversity, experimentation, and localism in setting regulatory policy.”<sup>117</sup> This willingness would surely be fostered by an agency culture that assigns importance to federalism values,<sup>118</sup> combined with institutional mechanisms designed to enforce them.<sup>119</sup> With the AWA, such traits were in evidence at Justice, to the detriment of a criminal justice policy with enormous ramifications for the states and the nation as a whole, leaving the promise of administrative federalism unfulfilled.

Despite the less-than-positive portrayal of agency behavior offered here, it is hoped that others will focus research energies on criminal justice rulemaking efforts. Even if unique, for reasons discussed, rulemaking by Justice and other federal agencies (such as DHS) will figure ever more centrally in American life. The perceived benefits of nationalized policy, not to mention the powerful political appeal in Congress of crime control and public safety, are simply too strong for the outcome to be otherwise. By highlighting the reality of agency dysfunction, if nothing else, this case study ideally will inspire calls for greater executive branch sensitivity to federalism concerns as these initiatives come to pass.

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<sup>117</sup> Metzger, *supra* note 8, at 2109; *see also id.* (asserting that “administrative law has significant potential to advance state interests within the framework of the national administrative state”).

<sup>118</sup> In a recent article, Catherine Sharkey identified a cluster of reforms intended to ensure greater state/federal agency involvement, many of which are already specified in Executive Order 13,132, including: requiring regular and early consultation in the rulemaking process, the designation of an ombudsman-like “federalism official,” and the creation of working groups of interested parties with which the agency can consult. *See* Sharkey, *supra* note 8, at 2160, 2170–72.

<sup>119</sup> *See id.* at 2172–91 (identifying “agency-forcing” measures, including possible codification of Executive Order 13,132, and making it judicially enforceable against agencies); *see also* Metzger, *supra* note 8, at 2101–05 (urging a greater judicial role in ensuring agency fealty to federalism interests).